United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-2173

In The

United States Court of Appeals

For The Second Circuit

ARTHUR DRAYTON,

Petitioner-Appellee,

-against-

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, DISTRICT ATTORNEY, AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL STATE OF NEW YORK DEPARTMENT OF CORRECTIONS OF THE CITY OF NEW YORK AND BENJAMIN MALCOLM, COMMISSIONER, ARTHUR RUBIN, WARDEN OF RIKERS ISLAND,

Respondents-Appellants.

BRIEF FOR PETITIONER-APPELLEE

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Statutes Involved

Rather than burden this appellate court with a verbatim statement of the pertinent statutes (The Respondents-Appellants have attempted such a verbatim statement, and have omitted pertinent material), Petitioner-Appellee describes the statutes involved as follows:

CPL 720.20 provided that a youthful offender may be relieved "from the onus of a criminal record." (subd. 1a). The same section provided that "where the conviction is had in a local criminal court and the eligible youth has not prior to the commencement of trial been convicted of a crime or found a youthful offender, the court must find he is a youthful offender". (subd. 1b). The same section provided, further, that, "upon determining that an eligible youth is a youthful offender, the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding; and the court must sentence the defendant pursuant to Section 720.25". (subd. 3). In Section 720.25, at subdivision (b) (ii), there was a provision prohibiting a sentence of imprisonment exceeding six months.

It may be noted that CPL 720.20 was amended in 1974, and CPL 720.25 was repealed. According to McKinney's 1974 Supplementary Practice Commentary, "Sentencing of youthful offenders is now governed exclusively by Penal Law §§60.01, 60.02 and 60.03 and the sections which they, in turn, incorporate by reference." Neither the amendments to CPL 720.20, nor the repeal of CPL 720.25, have any effect on the merits of this appeal.

From the pertinent provisions of the applicable statutes, it clearly appears that petitioner would have been entitled to youthful offender treatment, as a matter of right, if:-

1. The conviction were had in a local criminal court, and

2. If the petitioner were an eligible youth; and

3. If petitioner had not, prior to the commencement of trial, been convicted of a crime or found a youthful offender.

Petitioner was found, by the Court, to be an eligible youth. The only prior contacts of petitioner with law enforcement were in Juvenile Court. It is well established that an adjudication of juvenile delinquency is not a conviction. R. v. Ploskitt, 34 A.D. 2d 402. Petitioner had not been found, previously, to be a youthful offender, and there is no claim of any such finding in the record.

The only condition, therefore, which might justify the denial of youthful offender treatment to petitioner is, thus, the first listed condition above. This is the requirement of the conviction having been had in "a local criminal court". "Local criminal court" is defined in CPL, Sec. 10.10 (3). A number of categories are listed. Two categories are pertinent. "Local criminal court" means The New York City Criminal Court (CPL 10.10 (3(b)); and "Local criminal court" means "A supreme court justice sitting as a local criminal court" (CPL 10.10 (3(f)). In denying youthful offender treatment to petitioner, the sentencing Court has obviously held that he was not "sitting as a local criminal court", and since conviction was not had

in the New York City Criminal Court, the "local criminal court" condition was not met. It is petitioner's contention that, if such finding can be made under the CPL statutory scheme, then this statutory scheme is unconstitutional since it has deprived him of the equal protection of the law.

The Issue Presented

Petitioner-Appellee submits that the principal issue, on this appeal, is not fairly presented in the Brief of the Respondents-Appellants, framed at Page 1 of their Brief. The issue is not whether there is inequality as between youths "charged with felonies", and "those charged with lesser crimes". Rather, the issue, presented on this appeal, is whether New York may, despite the Equal Protection Clause of the Fourteenth Amendment, provide that a "superior court" may sentence an eligible youth, convicted of a misdemeanor, to an adult sentence, denying youthful offender treatment, while a "local criminal court" must grant youthful offender treatment to an eligible youth convicted of the very same misdemeanor. The United States District Court properly stated the issue as follows: "The issue raised by the petition is whether the Equal Protection Clause requires that no discrimination may be made in granting youthful offender treatment to eligible misdemeanants solely because conviction occurred in one court of the State rather than another." (155) [numerical references are to pages of the Respondents-Appellants' Appendix].

The District Court held that the Equal Protection Clause does impose such a non-discriminatory requirement, and therefor granted the petition (155).

Preliminary Statement

The Respondents-Appellants appeal from an order of the U.S. District Court for the Eastern District of New York, entered December 1, 1976, granting Petitioner-Appellee's application for a writ of Habeas Corpus and holding that Petitioner-Appellee's State Court sentence, which constituted a denial of youthful offender treatment, was in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it was imposed pursuant to a statutory scheme which permitted different courts to impose different punishment for the same offense.

The Facts

Petitioner-Appellee was indicted and charged with attempted robbery, Second Degree, and assault, Second Degree, committed on August 18th, 1972. On May 15th, 1973, he appeared at the Supreme Court, Kings County, Criminal Term, Part 18, Koota, J. presiding, and applied for permission to withdraw a previous plea of not guilty to the indictment and to plead guilty to assault in the Third Degree, a Misdemeanor. The Court inquired of the District Attorney as to whether that plea was acceptable to the People. The assistant District Attorney, appearing for the People, stated that the plea of assault in the Third Degree, a Class A Misdemeanor, was recommended by the People. The assistant District Attorney then stated "I had the complaining witnesses ***here in court and after discussion with both witnesses as to the matter that occurred on August 18, 1972- ***I have determined that the attempted robbery in the Second Degree

was not a proper disposition based upon the statement of the witnesses. It is an assault in the Third Degree at the most." The court noted that assault, Third Degree, was a Class A Misdemeanor (8). The court then ascertained that the petitioner-appellee was 17 years old (9) and observed that he was an eligible youth and could receive Youthful Offender treatment (11-12). The plea of guilty to the Misdemeanor was accepted (16). In answer to a question by the court, petitioner-appellee stated that he had no Criminal Record (19).

On August 27, 1973, petitioner-appellee appeared for sentence before Koota, J. (25). The court pointed out that Petitioner-Appellee had had two juvenile court experiences (26) and denied Youthful Offender treatment, and sentenced petitioner-appellee to incarceration for one year (28).

Petitioner-Appellee moved before the Supreme Court, Kings County, for resentence as a youthful offender claiming unconstitutionality of the statutory scheme by virtue of which he has been denied youthful offender treatment as a matter of right. This motion was returnable before the Criminal Term which denied petitioner-appellee's motion by order entered December 6, 1973. An application was made to the Appellate Division, Second Department, for leave to appeal from the order denying the motion for resentence. By order dated February 27, 1974, the Appellate Division granted leave to appeal. On appeal, the Appellate Division, Second Department, by order entered April 28, 1975, unanimously affirmed the judgment and

order of the criminal term. Petitioner-Appellee moved for reargument and reconsideration before the Appellate Division, Second Department. This motion was denied by order dated May 30, 1975. Petitioner-Appellee applied for leave to appeal to the Court of Appeals. The motion for leave to appeal to the Court of Appeals of the State of New York was granted by certificate dated June 9, 1975. The Court of Appeals of the State of New York affirmed on May 4, 1976. Petitioner-Appellee moved, in the Court of Appeals of the State of New York, for reargument. The motion for reargument was denied by the New York State Court of Appeals by order entered July 13, 1976. Petitioner-Appellee has thus exhausted all State remedies. Petitioner-Appellee respectfully submits that for the purpose of the consideration of this Court, the State remedies should be considered exhausted without any application to the Supreme Court of the United States for certiorari (Fay v. Noia, 372 U.S. 391).

By petition and order to show cause, dated September 16, 1976, Petitioner-Appellee applied to the U.S. District Court for the Eastern District of New York for a Writ of Habeas Corpus upon the ground that he had been denied Equal Protection of the law in violation of the Fourteenth Amendment (2-31). Respondents-Appellants opposed by affidavit (32-34) and memorandum of law (35-52). Petitioner-Appellee submitted a memorandum of law in support of the petition (53-87). On the return of the order to show cause, the U.S. District Court heard extensive argument of the parties (88-150), and reserved decision (139). Thereafter, in a well-reasoned opinion, in which all

arguments, advanced by the Respondents-Appellants, were decisively answered, the U.S. District Court held that there was no rational basis for the statutory discrimination which provided different treatment for eligible youths convicted of the identical offense merely because their respective convictions took place in different courts (151-170).

The Argument

Point I

Petitioner Had Been Denied Due Process And Equal Protection Of The Law By The Sentencing Court, In Violation Of The Fourteenth Amendment To The Constitution Of The United States. The Statutory Scheme, By Virtue Of Which He Had Been Denied Youthful Offender Treatment, And A Sentence Of Six Months, Maximum, Is Unconstitutional.

The prosecution conceded that the facts, attested to by the complaining witnesses, revealed that petitioner should have originally been charged with a misdemeanor rather than a felony (8). Presumably, other defendants would be charged with misdemeanors only. Defendants, charged with misdemeanors, would be prosecuted in a local criminal court (Cf. CPL 10.30). Such defendants, in all other respects in the same circumstances as petitioner, would be entitled to youthful offender treatment as a matter of right. having met all three conditions. Obviously, petitioner, due to sheer error in procedure of the prosecution, has been prosecuted in other than a local criminal court where he should have been prosecuted, and has

thus been deprived, without due process, of his right to youthful offender treatment. He has been denied equal protection of the law. The result would be the same even if the prosecution had not made an error. Even if the prosecution had been intentionally steered into the Supreme Court, as a matter of choice between the Supreme Court and the local criminal court, petitioner would still have been denied equal protection of the law, because others, in his identical circumstances, having committed the identical crime, would have been prosecuted in a local criminal court where they would be entitled to youthful offender treatment as a matter of right. Thus the degrees of punishment, for the same crime, would differ as between persons in the same situation and circumstances.

A statute which prescribes different degrees of punishment for the same acts, committed under the same circumstances, by persons in like situations, denies equal protection of the laws in violation of the Constitution. "Equal protection of the laws" requires that, in the administration of criminal justice, none shall be subjected, for the same offense, to any punishment greater or different from that to which others similarly situated are subjected. U.S. v. Meyers, 143 Fed. Supp. 1. The 14th Amendment to the U.S. Constitution provides that no State may "deny to any person within its jurisdiction the equal protection of the laws."

A statute, imposing punishment for violation of a liquor law, applicable to five counties, different from the punishment, for the same violation, applicable to other counties of the State, was

held invalid in State v. Fowler, 136 S.E. 709.

A statutory scheme, respecting the treatment of youthful offenders, was held to be unconstitutional, as a denial of equal protection, because it provided that 16 and 17 year old offenders, arrested in a certain city, be tried as adults, while, if arrested outside the city, the same offenders would be treated as juveniles. Long v. Robinson, 316 F. Supp. 22, App. den. 432 F 2d 977, aff'd 436 F 2d 1116.

It is of no materiality that the prosecution may not have intentionally steered the prosecution of the petitioner away from New York City Criminal Court where he would have had the right to youthful offender treatment. The fact remains that he was not afforded that right, while others, convicted of an identical crime, under identical circumstances, in every respect, acquired that right automatically.

"Due process requires that all juveniles be treated alike, just as much as it requires that all adults be treated alike. To allow the States, regardless of the motives of its officers, to deprive (an accused juvenile) of the same rights accorded other juveniles ...is... deprivation of his Constitutional rights as required under the due process clause of the 14th Amendment to the Constitution. Regardless of the well-intentioned motives of all the judicial officers involved, this Court cannot help but believe that due process must, under all circumstances, encompass the requirement that all persons, rich or poor, young or old, be accorded equal treatment." Redmon v. Peyton, 298 F. Supp. 1123, 1127, mod., o.g., 420 F.

2d 822.

"Generally speaking, the law with respect to the punishment to be inflicted for a crime must operate equally on every citizen or inhabitant of the State, and a Statute is void as a denial of the equal protection of the laws which prescribed different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in like situation." Vol. 16A C.J.S. pages 529-530, Sec. 564.

It is, of course, impossible to evolve a statutory scheme which will insure against all differences in punishment administered. However, when statutory distinctions are made, they must be based upon reason, and must have a purpose which is apparent and logical.

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Walters v. City of St. Louis, 347 U.S. 231, 237." Baxstrom v. Herold, 383 U.S. 107, 111.

Classification of persons, for purposes of legislation, may "not be palpably arbitrary". Matter of Dorn "HH" v. Lawrence, "11", 31 N.Y. 2d 154, 158.

In re Buttonow, 23 N.Y. 2d 385, the Court followed the decision of the Supreme Court of the U.S. in Baxstrom v. Herold, 383 U.S. 107, Supra, and paraphrased the Baxstrom opinion to dispose of the issue in Buttonow. This Court might well again paraphrase the Baxstrom opinion by holding that the New York legislature, having

accorded to youthful offenders the right to special treatment under CPL 720.20, and a prohibition of "a definite sentence of imprisonment with a term in excess of six months" under former CPL 720.25 (b) (ii), "may not consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold" such right and prohibition by limiting such right and prohibition to offenders convicted "in a local criminal court" under CPL 720.20 (I) (b), and thus withhold such right and prohibition from the petitioner only because he has been convicted in the Supreme Court.

"The constitutional provisions ... (14th Amendment to the U.S. Constitution) extended the protection to all persons ... and prohibit any state legislation which in effect denies to any ... individual the equal protection of the laws. (See Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 ALR 375). It has been held, and rightly so, that a provision not objectionable on its face may be adjudged unconsti tutional because of its effect and operation. East Coast Lumber Terminal v. Town of Babylon, 2 Cir., 174 F 2d 106, 8 A.L.R. 2d 1219, and every state official, high or low, is bound by the Fourteenth Amendment. United States v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 ... (a) classification is discriminatory ... (if) it distinguishes between users who ride by charter motor bus as against all others. Supreme Court rulings on the issue are contained in Truax v. Corrigan (257 U.S. 312) wherein on page 337 of 257 U.S., on page 131 of 42 S. Ct., the Court said that classification must be reasonable and this classification 'Must always rest upon some difference which

bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis' ... ' ... constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. ... Arbitrary selection can never be justified by calling it a "classification". ...Therefore equal protection of the laws is denied when all persons in the same class are not treated alike under like circumstances and conditions, both in the privilege conferred and liabilities imposed. Sacharoff v. Corsi, 294 N.Y. 305, 62 N.E. 2d 81.; People v. Ditnial, 59 Misc. 2d 264.

"Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. C.F. Dominion Hotel, Inc., v. Arizona, 249 U.S. 265; Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412; New York Rapid Transit Corp. v. City of New York, 303 U.S. 573; Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535". Walters v. City of St. Louis, 347 U.S. 231, 237.

" 'The Legislature may create statutory distinctions, but

the power cannot be exercised arbitrarily and the distinctions must have some reasonable basis...' Park Ave. Clinical Hospital v. Kramer, 48 Misc. 2d 826, 829, 266 N.Y. S. 2d 147, 151, mod. 26 A.D. 2d 613, 271 N.Y.S. 2d 747, aff'd 19 N.Y. 2d 958, 281 N.Y.S. 2d 359, 228 N.E. 2d 411." North Bellmore Teachers Ass'n v. Board of Ed. of Union Free School Dist. No. 4, 68 Misc. 2d 238.

It is clear and obvious that the distinction, attacked at bar, has no reasonable basis whatsoever. It makes absolutely no sense that a valuable right accrues to a convicted defendant in the New York City Criminal Court, and may be denied to another identical defendant in the Supreme Court for no other reason, whatsoever, than the mere difference in Courts!

There can be no doubt that when individual rights are involved all must stand on an equal footing before the bar of justice. Furthermore, a classification which serves as a basis for unreasonable and arbitrary discrimination between persons in meting out justice violates the fourteenth amendment." Haley v. Troy, 338 F. Supp 794, 801.

The classification, at bar, creating a difference in treatment of identical persons, because of a mere difference in courts, is the basis of the unreasonable and arbitrary discrimination condemned in the Haley case, supra, and other cases herein cited.

"...in view of all the circumstances that exist, the different forms of treatment afforded violators of the section, the unnatural classification of violators and penalties to be imposed for such transgressions, ... the section violated the rights and privileges

afforded persons under both the U.S. Constitution and the Constitution of New York State." People v. Paddock, 56 Misc. 2d 123.

In a recent case, it was pointed out that CPL 720.10, subd. 2(a), part of the very statutory scheme under attack at bar, rendered an otherwise eligible defendant ineligible to be found a youthful offender merely because he had been indicted for a class A felony. The statute was declared to be violative of due process. The Court pointed out that an indictment consisted of "untested allegations" and ceased to exist" after an adjudication of the charges contained therein .....Ultimately, of course, the penalties prescribed for particular offenses must depend upon the crime of which the defendant is convicted, not the offense with which he was originally charged.

"The restriction ..... also cannot prevail against the challenge under the equal protection clause since it irrationally discriminates against those youths who had been charged with Class A felonies but who would be ultimately convicted of lesser felonies. There is, and can be, no rational basis for treating differently youths who have been convicted of the same offense merely because one of them had originally been charged with a higher grade of offense. The restriction or classification based upon the charge made in the indictment rather than the charge proven in Court is utterly capricious and irrational. It is therefore invalid under the equal protection clauses of both the state and federal constitutions." People v. Brian R., 78 Misc. 2d 616, affirmed 47 A.D. 2d 599; also see People v. Charles S., 79 Misc. 2d 1058. The New York State Court of Appeals

reached the same conclusion on the basis of due process. People v. Barry A., 40 N.Y. 2d 990.

It is respectfully submitted that if CPL 720.10, subd. 2 (a), is unconstitutional and invalid, because it creates a "restriction or classification based upon the charge made in the indictment rather than the charge proven in Court", then, certainly, the statute, under attack at bar, must likewise be held to be unconstitutional and invalid for creating a restriction or classification based upon the Court in which the conviction is had, rather than upon the offense of which the defendant is convicted.

The objective of the Legislature in providing for the right to youthful offender treatment was to aid in the rehabilitation of young persons for the first time convicted of a crime. The provision for different treatment in different courts cannot possibly bear any relationship to this worthy social objective. The statutory scheme is, therefore, unconstitutional.

The Supreme Court of the United States has held:

"The Equal Protection Clause of (the 14th) Amendment does ... deny to States the power to legislate that different treatment to be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)." Reed v. Reed, 404 U.S. 71, 75-76.

The Fourteenth Amendment to the Constitution of the United States was proposed by Congress in 1866, shortly after the end of the Civil War. Its primary, historical purpose was to remove all doubt as to the status of the newly freed negroes, and to confer upon them rights equal to those of all citizens. In re Look Tin Sing, 21 F. 905. However, the rights established are personal rights and guaranteed to all, regardless of race or color. City of Birmingham v. Monk, 185 F. 2d 859, Cert. den. 341 U.S. 940.

Petitioner has every right to rely on the provisions of the Fourteenth Amendment as a guarantee that he will be afforded equal protection of the law.

"When the law lays an unequal hand on those who have committed the same quality of offense ..., it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins (118 U.S. 356), supra; Gaines v. Canada, 305 U.S. 337." Skinner v. Oklahoma, 316 U.S. 535, 541.

Equality of protection under the law requires that, in the administration of criminal justice, no person shall be subject to any greater, or different, punishment than another in similar circumstances. People v. Gilbert, 72 Misc. 2d 795.

It is of no moment that, in adopting the statutory scheme under attack, the Legislature was acting in good faith and without conscious attempt to discriminate between persons convicted in different courts. The essential question is whether the statute has created an unreasonable discrimination. Wales v. Gallan 61 Misc. 2d 681.

It is respectfully submitted that unreasonable discrimination exists when two persons convicted the identical crime, under identical circumstances, may be subject to different treatment and punishment, merely because they were prosecuted in different courts.

Point II

The Authorities, Cited By Respondents-Appellants, Are Not In Point.

The Respondents-Appellants argued, in the State Courts, that the Legislature, in enacting the challenged statutory scheme, "assured that the class of eligible youths automatically to be accorded youthful treatment and six months maximum sentences would contain no one accused of any crime more serious than a misdemeanor." (Emphasis supplied). It appears that the Respondents-Appellants are charging the Legislature with having vitiated the presumption of innocence, so firmly imbedded in our public policy, in that the mere accusation of a felony is sufficient, in the eyes of the legislature, according to the Respondents-Appellants' claim, to bar the accused from receiving Youthful Offender treatment, even if the felony accusation is conceded to have been erroneous and there is no felony conviction.

Respondents-Appellants, in the State Courts, argued that there is a "rational basis" for the legislative classification in the statutory scheme under attack on this appeal. The cases cited by the Respondents-Appellants, are not at all in point.

The Respondents-Appellants cite Williamson v. Lee Optical

Co., 348 U.S. 483, dealing with a statute which regulated activities of opticians, exempting sellers of ready-to-wear glasses. In a later decision, the Supreme Court referred to the Williamson case as dealing with "[e]vils in the same field ... of different dimensions and proportions, requiring different remedies." The Supreme Court distinguished the Williamson case by pointing out that it had no application to cases such as the case at bar, where "the law lays an unequal hand on those who have committed intrinsically the same .... offense". McLaughlin v. Florida, 397 U.S. 184, 194.

Respondents-Appellants cite Railway Express Agency v. New York, 336 U.S. 106, which involved a regulation prohibiting advertising on vehicles, but permitting business vehicles to carry signs advertising their own business. Certainly, as in Williamson, the Court was dealing, in the Railway Express case, with matters of "different dimensions and proportions", while at bar, the involvement is with "intrinsically the same ... offense".

Respondents-Appellants cite Dandridge v. Williams, 397 U.S. 471, in which a statute was held constitutional although it provided for a maximum allotment of aid to welfare families regardless of family size. It was contended that small families were being favored. It was explained, in a subsequent Supreme Court opinion that the claim, of discrimination against large families in the Dandridge case, "was rejected on the basis that state economic or social legislation had long been judged by a less strict standard .... Laws touching social and economic matters can pass muster under the Equal Protection Clause though they are imperfect." U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 544.

Respondents-Appellants cite McGinnis v. Royster, 410 U.S. 264, in which the issue was the constitutionality of a statute which denied state prisoners "good time" credit for presentence incarceration in county jails, while permitting credit for state prisoners released on bail, prior to sentence, up to the full period of ultimate incarceration. The Supreme Court found that the challenged distinction had a rational basis in that, "at state prisons a serious rehabilitive program exists. County jails, on the other hand, serve primarily as detention centers." (410 U.S. 271). Clearly in the McGinnis case there was a difference in rehabilitative programs. There is no analagous difference at bar.

The Respondents-Appelants argue that the challenged statutory scheme is justified by the fact that it eliminated multiple probation reports. How this factor would differ, if petitioner-appellee had been afforded the right to Youthful Offender treatment, does not at all appear, nor do the respondent-appellants even attempt to relate the question of the number of probation reports to the unequal protection of the law which petitioner-appellee has suffered.

The Respondents-Appellants argue that the challenged statutory scheme purposed to avoid the necessity of jury trials in cases not exceedingly serious. It does not appear how this purpose could possibly have any connection with petitioner-appellees claim of inequality of the protection of the law relating to sentence after a plea of guilty.

The Respondents-Appellants reiterate that the challenged statutory scheme is reasonable because it differentiates "between accused felons and accused misdemeanants." (Emphasis supplied). In

view of the presumption of innocence, petitioner-appellee submits that such a differentiation falls far short of establishing the reasonableness of the statutory scheme, and certainly has no bearing on the petitioner-appellee's claim of inequality of the protection of the law. While petitioner-appellee was, at one time, an "accused felon", that accusation was conceded to have been unjustifiable, and the inequality existed only between "accused misdemeanants" in different courts, there being no other difference between the two situations as between the State Supreme Court and the New York City Criminal Court.

The Respondent-Appellants cite U.S. v. CRAVEN, 478 F. 2d, 1329, cert. den. 414 U.S. 866, reh. den. 414 U.S. 1086, in which case the Court upheld the constitutionality of a statute which made it a crime for anyone under indictment to receive a firearm or ammunition shipped in interstate commerce. The People argued that this case is authority for the classification at bar, creating an inequality based upon the difference between defendants accused by information and defendants improperly accused by indictment. The Craven case is no such authority. At bar, the difference between misdemeanor information accusation and felony indictment accusation disappeared, and no such difference or distinction existed at the time of sentence when petitioner-appellee's constitutional rights were violated, since the Court had previously accepted the misdemeanor plea upon the recorded admission of the prosecution that there never had been any evidence sufficient to justify the indictment. On the other hand, the indictment, in the Craven case, was in full force and effect at the time

of the alleged violation. As a matter of fact, the Craven court, at 478 F. 2d. 1339-1340, quoted, with approval, from U.S. v. Thorenson, 428 F. 2d 654, as follows:

> "[We] think it not unreasonable for Congress to conclude that there is considerable likelihood that one indicted for such an offense has a propensity to misuse firearms. In so deciding, we mote that this conclusion by Congress.....is not forever conclusive upon a person so indicted. The prohibitory effect of the classification disappears as soon as the indicted person obtains dismissal of the indictment or acquittal on the charge.
>
> ".....While the provision in question does forbid indicted persons from transporting [receiving] firearms in interstate commerce while the indictment is outstanding, the indictment serves only as a temporary block pending disposition of the criminal proceedings in which the indictment was filed .....we think Congress may in pursuit of the sound objectives of the legislation, require indicted persons to tolerate this temporary limitation upon their right to transport weapons in interstate commerce. 428 F. 2d at 662.
>
> ".....[The challenged legislation] represents nothing more than a Congressional determination that one who is under indictment for crimes..... ought not to transport [receive] firearms in interstate commerce unless and until the indictment is dismissed or an acquittal is obtained.
>
> ".....428 F. 2d at 661."

This case has no application whatsoever to the issue, at bar, which is concerned with an inequality in punishment after conviction, rather than regulation of indictees during pendency of indictments. Such regulation, including incarceration and imposition of bail, has long been recognized. It has nothing to do with inequality of sentence.

The opinion of Shapiro, J., at the Appellate Division, is fallacious for the same reason. The issue is inequality in punishment which cannot be reconciled with constitutional due process or equality of protection of the law regardless of the nature of mere accusations. Shapiro, J., actually approved of a distinction in punishment "between those originally accused of a felony and those originally accused of a misdemeanor", regardless of the fact that, at bar, such distinction actually resulted in different punishment for the same conviction.

The Respondent-Appellants cite Jeffery v. Malcolm, 353 F. Supp. 395, as upholding a statutory New York scheme which permitted convicted felons to accumulate larger good time credit than convicted misdemeanants. That case is not at all applicable at bar, for the Court pointed out that,

> "The different treatment afforded to felons and misdemeanants ... is primarily explained by the fact that the.....sentences imposed on misdemeanants [are] substantially shorter....Since the primary purpose of the good behavior program is to provide an incentive for prisoner cooperation with the prison authorities, the State may well have determined that the incentive need be greater where the sentence is longer."

In addition, it was pointed out that felons are confined in institutions, different from those in which misdemeanants are incarcerated. The different institutions provide different facilities and programs which "justify the different computations applied for good behavior time. The legislature may properly allow greater flexibility for good behavior time against longer sentences, in

order to meet the rehabilitative and custodial problems inherent in a large prison system.

"Moreover, the definite sentences provided for misdemeanors reflect a legislative and judicial judgment as to the length of sentence actually to be served; the limited good behavior time allowed reflects an incentive for cooperation but also an indication that the definite terms are to be served. Where the term to be served is less definite, a greater good behavior time allowance seems appropriate."

Respondents-Appellants cite Quinones v. United States 516 F. 2d 1309, cert. den. 423 U.S. 852, which upheld the constitutionality of a Federal Statute that provided that youths charged with crimes punishable by death, or life imprisonment, could not be prosecuted as juvenile delinquents, and that the Attorney General could direct adult trials for youths accused of even lesser crimes. The Respondent-Appellants conclude that "If the Attorney General can route an accused away from the federal juvenile court, then the New York Grand Jury ought to be able to route an otherwise eligible youth away from automatic Youthful Offender treatment." The Respondents-Appellants are here disregarding the clear distinction between pre-trial dispositions, provided in the subject Federal Statute, and the post-conviction dispositions at bar.

The Criminal Term of the Supreme Court of the State of New York based its decision upon the argument, urged by the Respondents-Appellants to the effect that "The reasonable or rational basis for distinction in article 720 of the CPL lies in the nature of the original criminal accusation or charge against the eligible youth."

[Emphasis in the original]. The mere accusation of a felony is certainly not sufficient basis for a sentence of imprisonment. In adopting this argument, the Criminal Term actually negated the presumption of innocence, and accepted as a basis for administering punishment, a mere concededly unfounded accusation, rather than a conviction, a procedure permitted by the New York Statutory scheme.

The Criminal Term posed "the question: Is it unreasonable or invidiously discriminating or irrational for our Legislature to say that defendant at bar who is charged with the serious crimes of assault and attempted robbery should not have an absolute right to youthful offender treatment, but that an eligible youth who is accused of stealing apples from a street vendor shall have that right?" The obvious answer to this question is that it is, of course, "unreasonable" and "invidiously discriminating or irrational" to permit punishment based upon a mere charge of crime rather than upon a conviction; and this appears especially so if, as at bar, the accusation of the more serious crime was unjustified, as conceded in the record by the prosecution, and the accused was actually convicted of the much less serious crime. To use the terminology of the Criminal Term, it is definitely unreasonable or invidiously discriminating or irrational to say that a defendant who is charged with the serious crimes of assault and attempted robbery should not have the same absolute right of youthful offender treatment as a defendant who is accused of stealing apples from a street vendor, when it is conceded by the prosecution that the serious charge of assault and attempted robbery is unfounded and should not have been made, and that there should not have been any charge more serious than stealing apples

from a street vendor.

The Appellate Division stated, in its decision, that permission, to the petitioner-appellant "to plead to a misdemeanor was, in effect, an act of grace on the part of the People and the trial court." It is respectfully submitted that there was no grace, whatsoever, involved. The Respondents-appellants conceded that there never was any crime involved more serious than "assault in the third degree at the most", a misdemeanor, and that the indictment for "attempted robbery in the second degree was not a proper disposition". The Respondents-Appellants and the Trial Court were thus not being gracious at all. They were reducing the charge to what it should have been originally, and saving themselves from trying a charge which could not be proved. Even under these circumstances, the statutory scheme permitted unequal punishment.

Appellate Division Justice Shapiro, in a concurring opinion, held "that an unproved charge may, under certain circumstances, and when considered in connection with results of the presentence investigation, be indicative of the extent and seriousness of theimproper conduct of the defendant" (89). It appears that both the Criminal Term, and the Appellate Division, have completely ignored, in this case, the basic presumption of innocence. And, in this case, that presumption of innocence of the original charge ripened into a certainty of innocence when it was conceded by the Respondents-Appellants, and accepted by the Court, that the petitioner-appellee was not guilty of the original charge, and should not have been indicted. It is respectfully submitted, under these circumstances, that the unproved, discredited and withdrawn charge was not, at all,

indicative of any improper conduct, and should not have been entitled to any consideration, whatsoever, in the imposition of sentence.

Shapiro, J., in his concurring opinion, also made the observations that the petitioner-appellee had received "the benefit of a reduction in the potential maximum penalty" when the charge was reduced from a felony to a misdemeanor, and that to grant him youthful offender treatment would permit him "to take double advantage" of the inability of the prosecution to carry its workload so that plea bargaining was essential. It is respectfully submitted that this observation was wholly unwarranted. The charge was reduced from a felony to a misdemeanor because the respondents-appellants conceded that no felony had been committed, and that petitioner should not have been indicted for a felony. There was no plea bargain for the sole purpose of reducing the prosecution's workload. The plea of guilty to a misdemeanor was accepted because the petitioner-appellant had concededly committed no crime more serious than a misdemeanor. A plea bargain is a compromise of controversy. There was no controversy at bar. There was a clear concession. Petitioner-appellant gained no advantage. He was afforded only what he should have received at the outset, a charge limited to a misdemeanor. He now prays this Court that he be afforded only the same right to youthful offender treatment which would have been afforded to him if the prosecution had not made the mistake of proceeding against him in an inappropriate forum.

In its opinion, affirming the Appellate Division Order, the New York Court of Appeals stated: "The distinction between youths charged in superior as opposed to local criminal courts is not arbi-

trary; it is based on the nature of the crimes over which such courts have jurisdiction." Of course, it is not arbitrary to create a distinction between youths, charged with <u>different</u> crimes, and to provide for the respective charges to be heard in different courts - the more serious accusations in superior courts, the less serious in inferior courts. But this reasoning is not pertinent to the petitioner-appellee's argument which is to the effect that it <u>is</u> arbitrary, and a deprivation of equal protection, to create a distinction between the respective punishments to be administered to identical youths, charged and convicted of the <u>identical</u> crime, because of a mere difference in courts.

In its opinion, the New York Court of Appeals stated "that there is a rational basis for distinguishing between a youth accused of a felony and one charged with a misdemeanor". In making this statement, the court gave no consideration to petitioner-appellee's contention that the felony accusation against him was the result of an error on the part of the prosecution. This contention, although indisputably supported in the record, was also overlooked in the Appellate Division. Petitioner-appellee referred a number of times to the record of his plea of guilty to a misdemeanor at the Criminal Term. When the petitioner-appellee offered to plead guilty to a misdemeanor, the prosecutor "recommended acceptance stating, for the record, that it had been determined, by the prosecution, that, based upon statements of the two complaining witnesses, the charges, in the indictment, were unjustified and that, "This is an assault in the third degree at most." Was this not an admission, on the part of the prosecution, that petitioner-appellee should never have been accused of a felony? And should not this admission, by the prosecution, have been the subject of serious consideration by the State Courts which

have passed upon the petitioner-appellee's appeals? Yet, in the long opinions of the Appellate Division it is astounding that there was not a solitary mention of this admission, by the prosecution, of the serious error in accusing petitioner-appellee of having committed a felony. It is even more astounding that, in spite of the numerous references to this error of the prosecution in the petitioner-appellee's brief to the New York Court of Appeals, there is not a solitary reference to this error of the prosecution in its substantial opinion! The fact that petitioner-appellee has lost the right to Youthful Offender treatment because of a mere error, on the part of the prosecution, thus appears to have been completely overlooked by the State Courts. The oversight, on the part of the State Courts, is accentuated by the statement, in the Court of Appeals opinion, that "There is no invidious discrimination in a legislative decision that those individuals who, on preliminary investigation are believed to have committed felonies should not automatically be endowed with the benefit of Youthful Offender status". Is this statement intended to apply even if there is no foundation for, and actually sheer error in, the belief that a felony has been committed? In addition, in making the last quoted statement regarding "invidious discrimination", the Court overlooked the clear authority regarding invidious discrimination which was cited and quoted in petitioner-appellee's brief, as follows: "When the law lays an unequal hand on those who have committed the same quality of offense...,it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins (118 U.S. 356)....Gaines v. Canada, 305 U.S.337." Skinner v. Oklahoma, 316 U.S. 535, 541.

The New York State Court of Appeals also overlooked the prosecution's error by stating, in its opinion, that, "The rationality of the statutory classification is especially compelling in the instant case where defendant had been permitted to plead down to a misdemeanor. He now seeks to reap a double benefit from the congestion in the criminal courts and the crushing burden on our criminal courts and the crushing burden on our criminal justice system, by not only securing a plea to a lesser charge but also obtaining automatic youthful offender treatment. Indeed, if the trial court were aware that such consequences might flow from the acceptance of defendant's plea, it very well may not have been willing to dispense with a trial or disposition on the original felony charge." It appears, from this quotation, thatthe Court was clearly overlooking the record circumstances of the guilty plea. The congestion in the criminal courts has nothing to do with the acceptance of the guilty plea. Clearly, the plea was accepted because the prosecutor stated, for the record, that, based upon statements of the complaining witnesses, the indictment for a felony had no basis, and that, "This is an assault in the third degree at the most." After that statement, how could the trial court have "not...been willing to dispense with a trial or disposition on the original felony charge"? It is respectfully submitted that the Court labored under a vital misconception of the record.

In United States v. Bland, 472F. 2d1329, cert.den. 412 U.S. 909, cited by the New York Court of Appeals, the principal issue was whether defining in a statute, the term "child" as not including an individual, over 16 years of age, charged by the U.S. Attorney with certain offenses, constituted an unconstitutional legis-

lative classification, or a negation of the presumption of innocence. The statute, 16 D.C. Code, Sec. 2301(3) (A), was enacted by Congress "To improve the operation of the juvenile justice system in the District of Columbia by removing from its jurisdiction certain individuals between the ages of 16 and 18 whom Congress concluded (1) were beyond rehabilitation in the juvenile justice system and (2) whose presence in that system served as a negative influence on other juveniles." (472F.2d1332). Plainly, the classification in that statute had a rational basis, it was designed to protect against a rehabilitative class whose presence "served as a negative influence". There is no such rational basis for the classification in the statute at bar.

The Bland issue was described, by the Bland Court, in a footnote, 472F.2d1336-1337, as involving "determination of which jurisdiction - adult or juvenile - attaches....in the first instance." There is no such issue at bar. The issue, at bar, is whether it is violative of due process and equal protection to confer, upon one Court, the power to impose a harsher sentence than another court, upon the very same defendant, for the very same conviction of the very same crime. This distinction between the Bland case, and the case at bar, is plainly evident from the Bland Court's discussion of the effect, upon the presumption of innocence, of the prosecutor's decision determining whether an accused shall be tried as an adult or a juvenile. The Court said, "While the decision does have the effect of determining whether appellee is to be tried as an adult or a juvenile, it is not a judgment of guilt or an imposition of penalty. On the contrary, it is simply the result of a determination by the United States Attorney that there is sufficient evidence to

warrant prosecution of the appellee for the offense charged and that adult prosecution is appropriate. ....As the subsequent opinion of District Judge Gesell (U.S. v. Alexander, 333F. Suppl213), ruling on this same issue under this statute, recognized:

"It should be noted... that in the event of convictions the extraordinarily flexible provisions of the Federal Youth Correction Act... are completely available.

"... the United States Attorney's decision in the case at bar marks only the beginning of theprocess of adjudication of appellee's guilt, a process marked by the presence of all the traditional protections ofprocedural due process, followed by the extraordinarily liberal rehabilitation provisions of the Federal Youth Corrections Act." (472F.2d1338).

At bar, the unfounded, erroneous decision of the prosecutor to proceed by indictment has resulted, not in "the beginning of the process of adjudication", but in the imposition of a penalty violative of petitioner-appellee's constitutional rights of due process and equal protection of the law, despite the fact that the prosecutor conceded, on the record, as has been demonstrated, supra, that the procedure, by indictment, was unwarranted!

The New York Court of Appeals also cited Jackson v. State, 311So.2d658 (cited in the Court of Appeals unrevised opinion as 311So.2d662). In that case, the Court upheld the constitutionality of a statute which contained a provision that the circuit court (apparently an adult, rather than a juvenile, court) shall have exclusive jurisdiction of the trial of a child, over13, charged with a crime punishable by life imprisonment or death. It is respectfully submitted that this case is no authority at bar.

The New York Court of Appeals also cited Myers v. District Court For Fourth Judicial Dist., 518P2d836. In that case, the issue was whether a prosecutor may be endowed with discretion to file adult charges against juveniles who had been adjudicated delinquent for acts which would have constituted felonies if committed by adults. Not at all there involved was the pertinent issue, at bar, involving unequal protection against the power of imposition of different penalties by different courts, upon the same defendant, and for the same conviction of the same crime.

Respondents-Appellants list a number of statutes which they contend "make eligibility for lenient treatment accorded youths depend in part on the crime charged". With the exception of CPL 720.10 (New York), these statutes all deal with the Courts in which youths are to be tried, not with punishment, as at bar. New York CPL 720.10, that deals with punishment, was recently held to be unconstitutional by the New York Court of Appeals, in People v. Barry A., 40 N.Y. 2d, supra.

Respondents-Appellants, at the very end of their brief, on this appeal, make the interesting observation that "Fourteen judges have passed on Drayton's claim. Thirteen of them have found the statute in issue permissable under the Fourteenth Amendment." The argument is then advanced that this Court should "join the weight of considered judgment." This argument is as rational as the classification in the statute under attack. Are the Respondents-Appellants suggesting that this Court forego its right and duty to exercise independent judgment because other learned judicial officials have rendered judgments, even though they may have erred? The Supreme Court of the United States heard a case which had been decided in

favor of the defendant at The New York Supreme Court Trial Term by one judge, affirmed in the Appellate Division by four judges, one judge dissenting, and unanimously affirmed by seven judges in the New York Court of Appeals. The Supreme Court of the United States reversed. One United States Supreme Court Justice dissented and made an observation, similar to that of the Respondents-Appellants, at bar, regarding the number of judges who had erred in their decisions in the case. Basham v. Pennsylvania Railroad, 372U.S.699, 701. This Court should decide that the District Court Judge, at bar, like the Appellate Division dissenter in the Basham case, has made the only correct decision, at bar, to date.

CONCLUSION

THE ORDER OF THE DISTRICT COURT, UNDER REVIEW, SHOULD BE AFFIRMED.

Respectfully Submitted,

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NATHAN SCHWARTZ
Of Counsel

A 202 Affidavit of Personal Service of Papers

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FEDERAL COURT
SECOND CIRCUIT

Index No.

ARTHUR DRAYTON
PETITIONER-APPELLE

- against -

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, DISTRICT ATTORNEY, AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL STATE OF NEW YORK ET-AL.
RESPONDENTS-APPELLANTS

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1715 Lacombe Avenue; Bronx, New York

That on the 14th *day of* March, *19*77 *at* Municipal Building Brooklyn, N.Y.

deponent served the annexed *upon*

Appellees Brief Eugene Gold U.S. Dist. Atty. Kings Co.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 14th *day of* March, *19*77

Victor Ortega

Victor Ortega

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York Coun
Commission Expires March 30